UNITED STATES	)	
	)	**DEFENSE REPLY TO**
v.	)	**PROSECUTION RESPONSE TO**
	)	**DEFENSE MOTION TO**
MANNING, Bradley E., PFC	)	**COMPEL DISCOVERY**
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 13 March 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. In accordance with the Rules for Courts-Martial (R.C.M.) 701(a)(5), 701(a)(6), 701(a)(2)(A) and 906(b)(6), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ); and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the requested discovery.

ARGUMENT

2. The Government fundamentally misunderstands its discovery obligations in this case. It references inapposite federal case law for *Brady*, cites to the wrong rule in the Rules for Courts-Martial, and fails to follow the appropriate process for challenging discovery requests. After an overview of what the Government claims are its constitutional and other discovery obligations, the Government concludes, "in light of the facts and legal authority outlined above, the United States has produced all discoverable information that is required under RCM 703 and the Constitution." *See* Prosecution Response to Defense Motion to Compel Discovery, page 6. We have a very serious problem. The Government in this case does not know what it is doing.

3. The starting point for the Government's discovery obligations is R.C.M. 701. Shockingly, the Government seems to have completely overlooked R.C.M. 701. It believes instead that its discovery obligations are governed by R.C.M. 703.[1] It states in the first line of its legal argument, "Rule for Court-Martial (R.C.M.) 703(f) and the Supreme Court ruling in Brady outline the obligation of the United States to produce unclassified information." *See* Prosecution Response to Defense Motion to Compel Discovery, page 5. The Government could not be further off base.

4. R.C.M. 703 does not apply to the Government's discovery obligations; rather, it deals with the production of witnesses and evidence. As stated in an article by Lieutenant Colonel Eric Carpenter, "discovery and production rules are fairly simple if you can distinguish one from the other." *Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases,* THE ARMY LAWYER 31 (January 2011). He explains the difference as follows:

[1] The only reference to 701 in the Government's motion is at p. 5, where the Government states that "The rule does not govern the production of classified information." *See* R.C.M. 701(f).

> Fundamentally, discovery rules govern how the parties will exchange information. The rules for discovery establish how each party must help the other party to develop the other party's case. Discovery deals with preparation and investigation. Discovery means finding or learning something that was previously unknown and is used to "reveal facts and develop evidence." A party can seek discovery and obtain information that might not be not admitted into evidence at trial. For example, the information might be used to develop other evidence that the party will eventually try to admit.
>
> In contrast, production rules focus on presenting evidence or witnesses at trial. At that point, the party has been through discovery, gathered facts, and chosen which facts will be introduced as evidence at trial. The party now needs the help of compulsory process to bring those facts to the courtroom typically through a witness or physical evidence.
>
> When we look at the RCMs, we see language that reflects this fundamental difference between discovery and production. For example, look at the rule that deals with specific discovery requests from the defense, RCM 701(a)(2)(A). This rule states that when the defense requests a specific item, then the government must disclose that item if certain conditions are met. One of those potential conditions is that the item must be "material to the preparation of the defense." That language deals with preparation and investigation, not with whether that item will ultimately be introduced at trial.

Id. at 31-32 (footnotes omitted). The Government has completely confused the difference between "discovery" and "production." It has inexplicably been operating under the assumption that 703, the production rule, governs its discovery obligations. It is no wonder why the Government has not provided any of the requested discovery, including *Brady* discovery it does not even know what rules govern.

5. Below, the Defense addresses the Government's fundamental misunderstanding of its *Brady* obligations, its other discovery obligations pursuant to R.C.M. 701(a)(2)(A) and the entire process of trying a classified evidence case.

A. The Government Does Not Understand its *Brady* Obligations

6. As indicated, R.C.M. 701 is the relevant rule governing pretrial discovery. In particular, R.C.M. 701(a)(6) provides the following:

> 701(a)(6) *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:
>
> (A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

7. R.C.M. 701(a)(6) is the military's version of the *Brady* rule. *See*, e.g., *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004) ("Regardless of whether the defense has made a request, the Government is required to disclose known evidence that 'reasonably tends to' negate or reduce the degree of guilt of the accused or reduce the punishment that the accused may receive if convicted." *See* R.C.M. 701(a)(6); *see also Williams*, 50 M.J. at 440 (noting that R.C.M. 701(a)(6) implements the disclosure requirements of *Brady* [ ])(emphasis added). The rule is not mentioned even once in the Government's response.

8. R.C.M. 701(a)(6) is much more expansive than the U.S. Supreme Court's actual decision in *Brady*. Military courts have recognized this time and again. For instance, in *United States v. Trigueros*, 69 M.J. 604 (A. Ct. Crim. App. 2010), the Army Court of Criminal Appeals very recently remarked that:

> Our superior court has previously noted that R.C.M. 701, "which sets forth specific requirements with respect to evidence favorable to the defense implements . . . the Supreme Court's decision in *Brady v. Maryland* . . ." We view our superior court's guidance as requiring us to analyze nondisclosure issues under the statutory and executive order standards set forth by R.C.M. 701 and Article 46, UCMJ, which are broader than the *Brady* constitutional standard. . . . The military justice system provides for broader discovery than due process and *Brady* require.

Id. at p. 609, 610 (emphasis added); *see also United States v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986) (the broad discovery rights granted by Congress and the President are intended to provide "more generous discovery to be available for [the] military accused" than the minimal requirements of pretrial disclosure required by the Constitution); *United States v. Mott*, 2009 WL 4048019 at *4 (N-M. Ct. Crim. App. 2009) ("Article 46, UCMJ, and R.C.M. 701 give an accused the right to obtain favorable evidence. Discovery in a court-martial context is broader than in federal civilian criminal proceedings and is designed to eliminate pretrial 'gamesmanship.'"); *Santos*, 59 M.J. at 321 ("The military justice system provides for broader discovery than required by practice in federal civilian criminal trials. Article 46, UCMJ, mandates that 'the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.' The President has implemented Article 46 in Rule for Courts Martial 701."); *Trigueros*, 69 M.J. at 610 ("The military justice system provides for broader discovery than due process and *Brady* require."); *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990) ("[D]iscovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants."); *United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000) ("Discovery in military practice is open, broad, liberal, and generous."); *United States v. Simmons*, 38 M.J. 376, 380 (C.M.A. 1993) ("Congress intended more generous discovery to be available for military accused."); *United States v. Killebrew*, 9 M.J. 154, 159 (C.M.A. 1980)

("Military law has long been more liberal than its civilian counterpart in disclosing the government's case to the accused and in granting discovery rights."); *United States v. Adens*, 56 M.J. 724, 731 (A. Ct. Crim. App. 2002) ("The military criminal justice system contains much broader rights of discovery than is available under the Constitution or in most civilian jurisdictions.") (citations omitted).

9. The wording of the rule itself shows that it is intended to be broader than the minimum due process protections provided by the *Brady* case. *See*, e.g., Carpenter, *supra,* at 34 ("RCM 701(a)(6) states that the benefit of the doubt goes to the defense: the government needs to disclose the evidence if it reasonably tends to be favorable.")(emphasis in original).

10. Additionally, the trial counsel has a greater obligation than even R.C.M. 701(a)(6) would suggest. This is because Army Regulation (AR) 27-26, Rule 3.8(d) provides:

> **RULE 3.8 Special Responsibilities of a Trial Counsel**
>
> A trial counsel shall:
>
> *(d)* make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation;

The Commentary to this Rule recognizes that "A trial counsel is not simply an advocate but is responsible to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." *Id.* Further, Rule 3.4 provides:

> **RULE 3.4 Fairness to Opposing Party and Counsel**
>
> A lawyer shall not:
>
> *(a)* unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
> ...
>
> *(d)* in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

The Commentary to this section observes:

> The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of

> evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the Government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed.

Id. See United States v. Kinzer, 39 M.J. 559, 562 (A.C.M.R. 1994); *Adens*, 56 M.J. at 731-32. *See also* Captain Elizabeth Cameron Hernandez, *The Brady Bunch: An Examination of Disclosure Obligations In the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 187, 241 (2011)("As evident in the broad language of Model Rule 3.8(d), a prosecutor's duty to disclose evidence is more expansive than that required in *Brady*. Additionally, the Model Rules make no provision for whether the information is "material" to the defense; rather, it requires disclosure of "all evidence or information" which may negate the guilt or mitigate the offense of the accused."). Thus, the Government has an obligation under Rule 701(a)(6) and AR 27-26 to turn over evidence "favorable" to the accused. The *Brady* standard in the military is not the exacting one under which the Government has been operating for almost two years.

11. In its Response to the Defense Motion to Compel Discovery, the Government fundamentally misapprehends its *Brady* obligations. It believes that the threshold of *Brady* material is one that does not exist in the military justice system. It is well-established that while *Brady* may be the starting point in discovery obligations, it is not the end point. Under the Government's reading of *Brady*, it would only be required to disclose an exculpating "smoking gun" in order to fulfill its *Brady* obligations. This is simply not the case.

12. Aside from a case cited by the Defense (*Williams*), the Government does not cite a single military case dealing with *Brady*. Rather it cites broad and misleading propositions of law from the United States Supreme Court. Nowhere is this more apparent than in the Government's use of the *Cone v. Bell* case. *See* 556 U.S. 449, 129 S. Ct. 1769 (2009). The Government cites *Cone* for the proposition that "favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[2] *See* Prosecution Response to the Defense Motion to Compel Discovery, page 5. The Government does not mention that the quotation is followed by footnote 15 which reads, in its entirety:

> Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady,* only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. See *Kyles,* 514 U.S., at 437, 115 S.Ct. 1555 ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3 3.11(a) (3d ed.1993)"). See also ABA Model Rule of Professional Conduct 3.8(d) (2008) ("The prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence or information known to

[2] Even if this were the applicable standard—which it most certainly is not—the Government is citing the standard of appellate review (i.e. whether confidence in the verdict is undermined).

> the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal"). As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.

Cone, 129 S. Ct. at 1783 n.15 (citations omitted). The Supreme Court itself thus recognizes that *Brady* operates as a floor and not a ceiling for the Government's disclosure obligations. As indicated, under the military justice system and under the Regulation governing the Government's ethical responsibilities, disclosure obligations in the military are much broader than the *Brady* case and its federal progeny would suggest.

13. The Government then cites *Cone* for another misleading proposition, that "evidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true." *See* Prosecution Response to the Defense Motion to Compel Discovery, page 6. The Defense reads this as suggesting that its requested discovery material (in particular, the damage assessments) may be relevant for sentencing, but that does not mean that they are relevant to guilt or innocence. Thus, the Government believes the damage assessments do not need to be produced because they are not *Brady* material.[3] The Government has completely taken this sentence out of context. In *Cone*, the state withheld evidence of the defendant's drug use which the defense maintained was relevant to the sentence the defendant ultimately received. The Supreme Court agreed, stating:

> Neither the Court of Appeals nor the District Court fully considered whether the suppressed evidence might have persuaded one or more jurors that Cone's drug addiction especially if attributable to honorable service of his country in Vietnam was sufficiently serious to justify a decision to imprison him for life rather than sentence him to death. Because the evidence suppressed at Cone's trial may well have been material to the jury's assessment of the proper punishment in this case, we conclude that a full review of the suppressed evidence and its effect is warranted.

Id. at 1786 (emphasis added) (citations omitted). Thus, far from supporting the Government's position, the *Cone* case undermines it. The *Cone* case recognizes that evidence may be *Brady* material if it would be important for sentencing, even though it may not have been relevant for the merits.[4] It appears that the Government is operating under the assumption that evidence is not *Brady* material unless it deals with the merits of the case, rather than sentencing. This point

[3] The Defense believes that this utter misreading of the law also explains why the Government has gone to great pains to distinguish between "could" and "should" in reference to the damage assessments. Even if one were to accept that whether the alleged leaks caused actual damage was not relevant to the merits (which the Defense does not in any way concede), the actual damage done by the leaks is most certainly material for sentencing. But by trying to distinguish between "could" and "should" and then very misleadingly citing a case saying that evidence that is material for sentencing may not be material for the merits, the Government is clearly attempting to evade its disclosure obligations.

[4] The Defense did not distinguish any of the other cases cited by the Government simply because the Government is so wholly off-the-mark on the relevant disclosure obligations.

is also illustrated in the Government's citation to *United States v. Agurs*, 427 U.S. 97, 112 (1976), where the Government emphasizes that "the proper standard of materiality must reflect our overriding concern with the justice of the *finding of guilt*." (Government italics). By italicizing the expression "finding of guilty" the Government is reading *Brady* to mean that evidence that is favorable as to sentencing is not *Brady* material. The Government utterly fails to understand what *Brady* (either the military or federal version) means.

14. The Government has an affirmative duty to seek out *Brady* material. *See United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999). The Defense, in other words, does not need to request *Brady* material in general, or specific items it believes constitute *Brady* material, in order for the Government's obligation to disclose that information to arise. *See*, e.g., *United States v. Agurs*, 427 U.S. 97, 107 (1976). Thus, the relevant inquiry is the following: Is the material "favorable" to the defense within the meaning of R.C.M. 701(a)(6)?[5] If so, the material must be turned over to the Defense.[6]

15. The Government's insistence that the Defense make an acceptable showing that the information is "relevant and necessary" under R.C.M. 703 (the production rule) is completely misplaced. The Defense has no such obligation. The obligation is the other way around: the Government must disclose information which is favorable under R.C.M. 701(a)(6) to the Defense "as soon as practicable." Here, the Government has not done so.

16. The Defense strongly believes that the damage assessments and associated reports are classic *Brady* material. The Defense believes that these damage assessments will show that the alleged leaks did minimal to no damage to national security. The Defense has several good faith bases for these beliefs. First, Government officials have publicly referred to reports which indicate that the alleged leaks did not compromise sources or methods. Second (and perhaps more important), if the information were not favorable to the Defense, the Government would gladly have handed the material over to the Defense. That the Government has been fighting tooth-and-nail to withhold discovery in contravention of its obligations demonstrates that the evidence is favorable within the meaning of *Brady*.[7] As such, the Defense strongly believes that the Government has deliberately withheld *Brady* material, impacting the accused's right to a fair trial.

B. The Government Does Not Understand the Discovery Process Outside of *Brady*

17. Separate and apart from the *Brady* issue, properly understood, R.C.M. 701(a)(2)(A) allows for the Defense to inspect documents and reports. In other words, the obligations under R.C.M. 701(a)(2) are <u>in addition</u> to the obligations found under the military rule which embodies *Brady*. R.C.M. 701(a)(2)(A) reads:

> After service of charges, upon request of the defense, the Government <u>shall permit</u> the defense to inspect:

[5] As qualified by the Government's ethical responsibilities under Regulation.
[6] Claims of privilege are discussed under Section C.
[7] Even if such evidence were not *Brady* material, it is still subject to disclosure under R.C.M. 701(a)(2)(A).

> (A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.

Id. (emphasis added). Under this rule, the Government has an obligation to allow the Defense to inspect, inter alia, documents or tangible objects within the possession, custody or control of military authorities.[8] The only limitation is that these items must be "material to the preparation of the defense." This is not, in any way, an exacting standard.

18. Specific discovery requests must be turned over if the requested information or items would be relevant or helpful in any way to the defense, even if that information will not ultimately be admissible at trial. The requested items, in fact, do not need to be favorable; even unfavorable items may be material to the preparation of a defense. *See Adens*, 56 M.J. at 734-35.

19. The case law reaffirms that "material" under R.C.M. 701(a)(2)(A) is not a difficult standard to satisfy. In *U.S. v. Cano*, 2004 WL 5863050 at *3 (A. Crim. Ct. App. 2004), our superior court discussed the content of the "materiality" standard under R.C.M. 701(a)(2)(A):

> In reviewing AE V in camera, the military judge said that he examined the records and AE III contained "everything . . . [he] thought was even remotely potentially helpful to the defense." That would be a fair trial standard, but our examination finds a great deal more that should have been disclosed as "material to the preparation of the defense." We caution trial judges who review such bodies of evidence in camera to do so with an eye and mind-set of a defense counsel at the beginning of case preparation. That is, not solely with a view to the presentation of evidence at trial, but to actually preparing to defend a client, so that the mandate of Article 46, UCMJ, is satisfied.

See also U.S. v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004) ("The defense had a right to this information because it was relevant to SA M's credibility and was therefore material to the

[8] All of the specific Defense requests ask for information which is in the "possession, custody, or control of military authorities" within the meaning of *Williams*, 50 M.J. 436 (C.A.A.F 1999). The Government has not once in the past year and a half objected to any of the Defense's discovery requests on the basis that the information sought is not in the "possession, custody, or control of military authorities." Rather, the Government has simply said that the requests were not specific enough or that it did not believe the material was relevant or necessary under R.C.M. 703. In the event that the Government now switches its "game plan" to deny discovery, it should be estopped from arguing that any of the Defense's requested information is not in the "possession, custody, or control of military authorities." *See*, e.g., *United States v. Bryan,* 868 F.2d 1032, 1036 (9th Cir. 1989) ("The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant."); *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993) (holding that trial counsel must exercise due diligence in discovering the results of exams and tests which are in possession of CID); *Kyles v. Whitley,* 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

preparation of the defense for purposes of the Government's obligation to disclose under R.C.M. 701(a)(2)(A).")(emphasis added); *Adens*, 56 M.J. at 733 ("We respectfully disagree with our sister court's narrow interpretation that the term 'material to the preparation of the defense' in R.C.M. 701(a)(2)(A) and (B) is limited to exculpatory evidence under the *Brady* line of cases and hold that our sister court's decision in *Trimper* should no longer be followed in Army courts-martial. There is no language in R.C.M. 701, or in its analysis, indicating any intent by the President to limit disclosure under Article 46, UCMJ, to constitutionally required exculpatory matters. As noted above, R.C.M. 701 is specifically intended to provide 'for broader discovery than is required in Federal practice' (R.C.M. 701 Analysis, at A21 32), and unquestionably is intended to implement an independent statutory right to discovery under Article 46, UCMJ."); *United States v. Webb,* 66 M.J. 89, 92 (C.A.A.F. 2008) ("[U]pon request of the defense, the trial counsel must permit the defense to inspect any documents within the custody, or control of military authorities that are 'material to the preparation of the defense.' R.C.M. 701(a)(2)(A). Thus, an accused's right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy.").

20. Thus, under R.C.M. 701(a)(2)(A), the Government must turn over specifically requested items that are material to the preparation of the Defense. The Defense does not need to show that the items are "relevant and necessary" under R.C.M. 703, as the Government believes.

21. If the Government does not think that the requested items are "material to the preparation of the defense," the Government cannot, under any circumstances, unilaterally withhold discovery. *See United States v. Gonzalez*, 62 M.J. 303, 306 (C.A.A.F. 2006) ("When a defendant makes a specific request for discoverable information, it is error if the Government does not provide the requested information."). The appropriate course of action if the Government maintains that the requested material does not meet the R.C.M. 701(a)(2)(A) standard is to follow the procedures outlined in R.C.M. 701(g)(2) for an in camera determination by the Military Judge. The Rule provides, in pertinent part:

> Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge.

22. In other words, if the Government believes that a discovery request is inappropriate, it must file a motion with the military judge requesting an in camera review. It cannot continue to state that the Defense has not adequately demonstrated materiality within the meaning of R.C.M. 701(a)(2)(A) and thereby refuse the discovery request.[9] Alternatively, if the material is classified, the Government must proceed under M.R.E. 505, discussed below. This comports

[9] For example, the Government does not believe that the hard drives of soldiers within PFC Manning's unit are "relevant and necessary" (the wrong standard). Perhaps this also means that the Government does not believe that this physical evidence is material to the preparation of the Defense. If so, the Government must motion the Military Judge under R.C.M. 701(g)(2) for an appropriate determination (or under R.C.M. 505, if the material is classified). It cannot continue, as it has for almost two years, to refuse to provide the discovery to the Defense because it does not feel that the Defense should get it.

with logic and common sense: How can an adversarial party be the unilateral arbiter of what is "material to the defense" within the meaning of R.C.M. 701(a)(2)(A)? The Government has not requested an in camera review because, of course, it is not even reading the correct discovery rule.

C. The Government Does Not Understand that the Potentially Classified Nature of the Information Does Not Mean that it Does Not Need to Comply With its Discovery Obligations

23. The Government believes that the classified nature of some of the discovery sought somehow means that the material is immunized from discovery. This is simply not the case. If the Government does not wish to turn over either: a) R.C.M. 701(a)(6)/*Brady* material (properly understood); or b) items specifically requested pursuant to R.C.M. 701(a)(2)(A) that is claims are classified, then it must follow the proper procedures under M.R.E. 505. The Government has not done so. Instead it has withheld discovery on the erroneous belief that M.R.E. 505 means that the information is not discoverable. *See* Prosecution Response to Defense Motion to Compel Discovery, p. 7 ("[T]he fact that these hard drives were collected from a classified facility, namely the SCIF, confirms that the rules of production under Military Rule of Evidence (M.R.E.) 505 should govern whether these images are discoverable.").

24. The Government has not claimed a privilege under M.R.E. 505(f), nor has the Government provided the requested information to the Court under M.R.E. 505(i). Instead, the Government has simply withheld the requested information under its belief that "production" and not "discovery" rules control. This is not only improper, it is an incorrect view of the law. Moreover, that the Government does not know what procedure to follow in a classified evidence case completely undermines the Defense's confidence in the ability of the Government to fulfill its discovery obligations.

D. The Government's Response Continues to Obscure the Truth

25. The Defense is tired of the games the Government continues to play. Even if the Defense could somehow overlook the elephant in the room that the Government does not understand military discovery the Government's response illustrates perfectly the gamesmanship that military courts do not countenance. The Defense provides some examples below. These are not intended to be comprehensive, but to show how disingenuous the Government has been in this proceeding.

i) The Government at page 1 states "on 16 November 2011, Defense did not specifically request files completed with the assistance of the Office of the Director of National Intelligence." The Government's statement gives the impression that the Defense never specifically requested files completed with the assistance of the Office of the Director of National Intelligence. Such a statement, as the Government fully knows, is inaccurate. The Defense, a month earlier, on 13 October 2011, specifically requested "any and all documentation relating to any review or damage

assessment conducted by ODNI [the Office of the Director of National Intelligence] or in cooperation with any other government agency." *See* Defense's 13 October 2011 Discovery Request at 1.c.vi. Likewise, when the Government states on page 2 of its response that the "Defense did not specifically request any alleged information completed by the WikiLeaks Task Force (WTF)" on 1 December 2011, this too is misleading. The Defense specifically requested information from the WTF on 13 October 2011 "any report, damage assessment or recommendation by the Wikileaks Task Force or any other CIA member concerning the alleged leaks in this case." *See* Defense's 13 October 2011 Discovery Request at 1.c.iii. Additionally, the Defense requested on 8 December 2010 "any and all documentation related to the Central Intelligence Agency (CIA) investigation of Wikileaks announced by CIA Director Leon Panetta..." The announcement by former CIA Director Panetta of the agency's review was the creation of the Wikileaks Task Force. Thus the Defense has repeatedly requested all of this information.

ii) The Government asks at page 8 that the "United States respectfully requests the Court deny Defense's request for damage assessments, if any should exist." The Government then states that it will not produce the "alleged damage assessment by the WTF" or the "alleged damage assessment by the IRTF." The Defense knows that these assessments exist. The Government should not be permitted to continue its game of smoke and mirrors by referring to an "alleged" damage report. It obviously knows that such reports exist; accordingly, it is not accurate to refer to them as "alleged" and to continue to refuse to acknowledge their existence.

iii) The Government has indicated at page 11 that the DOS "has not completed a damage assessment" and that ONCIX "has not completed a damage assessment." The Defense believes that the Government may be playing fast-and-loose with the term "completed." The Defense requested any and all reports and documents related to a damage assessment. That neither of these organizations has "completed" a damage assessment does not mean that the requested information does not exist.

iv) The Government states at page 12-14 that "the United States is unaware of 'any forensic results and investigative reports' from within [agency] that contributed to any law enforcement investigation. "Unaware" is not a standard; either these exist or do not exist. Notably, the Government does not indicate that it actually looked for the Defense-requested materials.

v) The Government says at page 8 that it intends to produce information related to the accused from an open FBI investigation "that is discoverable under Brady." As discussed above, the Government is operating under the wrong *Brady* standard. Moreover, the Government has an obligation to produce these files as part of the R.C.M. 701(a)(2)(A) request. Finally, why has the Government not already secured the appropriate approvals?

vi) With respect to almost every discovery request, the Government complains that the Defense has failed to state "with specificity" what it was requesting. Short of

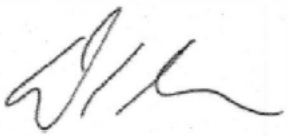
referring to a report/document by name, the Defense could not possibility state any of the discovery requests with more specificity. The Defense has asked for information, documents, reports, etc. created by certain named agencies related to the accused's alleged disclosure of documents. The Government knows full well "exactly what [the Defense] desires." Prosecution Response to Defense Motion to Compel Discovery, page 12-14. It just does not want to provide this information. Moreover, if the Government needs more specificity (i.e. does not understand what the Defense is seeking), how can it claim that the requested discovery is not "relevant and necessary"? If the Government cannot pinpoint what the Defense is looking for, then obviously it cannot claim that this unknown item is not "relevant and necessary." The two are wholly inconsistent.

26. The Government's responses to both the Protective Order and this Motion to Compel are disheartening. At the Article 32 hearing, I asked the Investigating Officer, "Is this the best that military justice can do?" I echo that sentiment again now.

CONCLUSION

27. Based on the above, and the original motion submitted by the Defense (including the ex parte supplement) the Defense requests that the Court order the Government to obtain the requested information and provide this information to the Defense.

Respectfully submitted,



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